5-29-2014

State v. Scales Respondent's Brief Dckt. 41289

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. BENNETT SCALES, Defendant-Appellant.	)	No. 41289 Ada Co. Case No. CR-2013-1239

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Bennett Robert Scales appeals from his judgment of conviction upon a jury's finding him guilty of felony domestic violence. Scales asserts the district court abused its discretion when the court denied Scales' motion, midway through trial, to continue until the next day so Scales could feel "a little bit more relaxed" in deciding whether to testify.

Statement of Facts and Course of Proceedings

The state charged Scales with felony domestic violence against his girlfriend, with whom he lived, for hitting her, breaking her nose. (R., pp. 5-6.) The matter proceeded to trial about five months later. (See Tr., p. 8.) The state presented testimony from the victim, the victim's treating physician, the victim's mother (who lived with the victim and Scales and witnessed the incident), the patrol officer who responded to the incident, and the domestic violence detective assigned to the case. (See Tr., pp. 88-165.) After the state rested, the trial court proposed a brief recess, which was taken. (Tr., p. 165, Ls. 8-16.)

Following the break, defense counsel indicated that Scales would take the stand, so the trial court began a colloquy with Scales about his decision and right to testify. (Tr., p. 165, L. 18 – p. 167, L. 18.) During this colloquy, Scales asked, "can I actually do this like tomorrow?" and defense counsel said, "He is a little emotional." (Tr., p. 166, L. 22 – p. 167, L. 1.) The trial court then suggested, "why don't you go ahead and talk things over [with counsel]. Let's take a real five-minute break." (Tr., p. 167, Ls. 16-18; see Tr., p. 166, Ls. 24-25.) After the

second recess, the trial court said, "well, it's 3:55. We do need to continue today. I'm not willing to continue until tomorrow. So feel free to drink some water, and we have some cough drops here. Just take your time. But we are going to proceed today." (Tr., p. 168, Ls. 19-23.)

Defense counsel stated for the record, "[Scales] has rethought things, Judge, and if the court insists upon going forward today, it's his position that he does now wish to invoke his Fifth Amendment privilege and not testify." (Tr., p. 169, Ls. 2-6.) This exchange followed:

THE COURT: Well, that's entirely Mr. Scales' decision, but it's 3:55. The jury is here. The jury is present. This is the day set for trial, so we need to proceed.

If you want to drink some water or something, there is no reason why you can't just feel like taking all the time you need to say whatever it is you would like to say to the jury.

THE DEFENDANT: That wasn't what I wanted, was take all the time.

THE COURT: Okay. And you are certainly free to testify if you want to.

THE DEFENDANT: That's all right.

THE COURT: It's your call. And like I said, you know, it's not unusual for people to feel, you know, a little stressed at this situation, but just take your time.

THE DEFENDANT: No, that's all right.

THE COURT: Okay. Now, do you want to testify or don't you?

THE DEFENDANT: No.

THE COURT: You don't want to testify?

THE DEFENDANT: One, I'm being pushed a little too quickly here.

THE COURT: Well, this is the time set for trial.

THE DEFENDANT: It's the time set for trial, but it's also my life, ma'am, up here.

THE COURT: Umm-hmm.

THE DEFENDANT: I'm the one – if this all goes wrong, I'm the one that goes out here and sits. It won't be you guys.

THE COURT: Um-hmm.

THE DEFENDANT: Okay? You will all get to go home. You get to go home, see your children. I don't.

THE COURT: Well, it's entirely your decision if you want to testify.

THE DEFENDANT: Let's get on with the jury, then.

THE COURT: And –

DEFENSE COUNSEL: Just to be clear, Judge – Mr. Scales, you are choosing, then, not to testify?

THE DEFENDANT: I don't want to testify at all.

THE COURT: Well, it's your –

THE DEFENDANT: I won't be rushed into it. I would rather file a motion.

THE COURT: I don't see why it's rushed into it, Mr. Scales. This is the day set for trial. I understand that earlier you were feeling a little emotional about things, but there is nothing wrong with that, and I don't see what benefit there would be in starting tomorrow.

It doesn't seem – I have trouble understanding why it would be any better to start any particular time later.

THE DEFENDANT: I would be a little bit more relaxed, ma'am.

THE COURT: Well, I'm sorry, but it is – trials are stressful.

THE DEFENDANT: Let's get on with it.

THE COURT: Okay. Well, it's entirely your choice. It's entirely your decision, if he wishes [sic] to testify. You have discussed it. He doesn't want to testify. We will proceed with the jury.

(Tr., p. 169, L. 7 – p. 171, L. 23.) The court called the jury back in, and the defense rested. (Tr., p. 171, L. 24 – p. 172, L. 5.)

The jury found Scales guilty of domestic violence. (R., p. 76.) Scales timely appealed the judgment. (R., pp. 81-82, 87-89.)

ISSUE

Scales states the issue on appeal as:

> Whether the district court abused its discretion, promoting a myopic insistence on expeditiousness in the face of a justifiable request for a recess, and in so doing, eviscerated several of Mr. Scales' constitutional rights.

(Appellant's brief, p. 4.)

The state rephrases the issue as:

Has Scales failed to show the court abused its discretion in denying a request, midway through trial, for a continuance until the following day so Scales could feel "a little bit more relaxed" in deciding whether to testify?

ARGUMENT

Scales Has Failed To Show The Court Abused Its Discretion In Denying A Request, Midway Through Trial, For A Continuance Until The Following Day So Scales Could Feel "A Little Bit More Relaxed" In Deciding Whether To Testify

A. Introduction

Scales argues the trial court abused its discretion in denying his request for a continuance after the state rested its case, so he could have until the following day to decide whether to testify. (Appellant's brief, pp. 5-13.) Scales contends the trial court's decision was the result of a "myopic insistence upon expeditiousness in the face of a justifiable request for delay." (Appellant's brief, p. 1.) However, because Scales never identifies a worthy justification for the delay, nor any substantial right impacted by the denial of the requested delay, he fails to show the trial court abused its discretion. Accordingly, his arguments fail.

B. Standard Of Review

The decision to grant or deny a continuance rests within the sound discretion of the trial court. State v. Nunez, 133 Idaho 13, 21, 981 P.2d 738, 746 (1999); State v. Hudson, 129 Idaho 478, 481, 927 P.2d 451, 454 (Ct. App. 1996). "Unless an appellant shows that his substantial rights have been prejudiced by reason of a denial of his motion for continuance, appellate courts can only conclude that there was no abuse of discretion." Nunez, 133 Idaho 13, 21, 981 P.2d 738, 746 (1999) (citing State v. Laws, 94 Idaho 200, 203, 485 P.2d 144, 147 (1971)). See also State v. Evans, 129 Idaho 758, 762, 932 P.2d 881, 885 (1997); State v. Hudson, 129 Idaho 478, 481, 927 P.2d 451, 454 (Ct. App. 1996).

C. Scales Has Not Identified A Justifiable Reason For, Or Constitutional Right Implicated By, His Mid-Trial Request For A Continuance, And Thus Fails To Show The Trial Court Abused Its Discretion In Denying His Request

"Trial judges necessarily require a great deal of latitude in scheduling trials." Morris v. Slappy, 461 U.S. 1, 11 (1983) (quoted in State v. Cagle, 126 Idaho 794, 797, 891 P.2d 1054, 1057 (Ct. App. 1995)). The burden of "assembling the witnesses, lawyers, and jurors" at the place and time for trial "counsels against continuances except for compelling reasons." Id. Accordingly, trial courts are afforded "broad discretion . . . on matters of continuances." Id. To show an abuse of scheduling discretion the appellant must demonstrate that his substantial rights were prejudiced by having to proceed with trial as scheduled. See Evans, 129 Idaho at 762, 932 P.2d at 885. In determining whether the denial of a continuance was "so arbitrary as to violate due process," the appellate courts must look to the circumstances of the case, particularly "the reasons presented to the trial judge at the time the request is denied." Ungar v. Sarafite, 376 U.S. 575, 589 (1964) (citations omitted).

In Ungar, the appellant had been a hostile but key witness for the prosecution in a state criminal trial. Id. at 576. Shortly after that trial, the trial court judge served a show-cause order on Ungar due to Ungar's disruptive comments and refusal to answer questions in the trial. Id. at 580-81. Ungar requested and was granted two brief continuances, then denied (at least) one other motion to continue, before his show-cause hearing for contempt. Id. at 581, 590. The trial court judge determined that Ungar was "afforded sufficient time to hire counsel who would be available at the time of the scheduled

hearing." Id. at 590. The U.S. Supreme Court agreed, holding that the "five days' notice given petitioner was not a constitutionally inadequate time to hire counsel and prepare a defense" in the circumstances of that case. Id.

As in Ungar, Scales has failed to show he was given a constitutionally inadequate time to prepare his case. Scales had five months from when he was charged until his trial, to confer with counsel and wrestle with the decision whether to testify. (R., pp. 5-6; Tr., p. 8.) The five witnesses who testified for the prosecution had all been identified in the state's witness list, two months before trial. (R., pp. 51-52.) The main witness against Scales – the victim – testified at the preliminary hearing nearly four months before trial. (See Prelim Tr.) The victim's testimony at the preliminary hearing is entirely consistent with her testimony at trial, and with the trial testimony of her mother who witnessed the assault. (Compare Prelim Tr. with Tr.) Indeed, Scales has not identified any reason why evidence from the state's case at trial – or any other reason – necessitated additional time for him to decide whether to testify. (See generally Appellant's brief.)

The United States Supreme Court considered a challenge to a ruling denying a continuance requested midway through trial. Morris v. Slappy, 461 U.S. 1 (1983) In that case, the defendant argued a continuance was needed because his counsel lacked sufficient time to prepare after taking over from prior counsel who was incapacitated by a medical emergency. Id. at 5-10. The Court's decision in Slappy included a detailed discussion of the evidence

supporting that, despite Slappy's assertions, his counsel "was fully prepared and 'ready' for trial." Id. at 5-10, 12.

"In our view," the Court said, "the record shows that the trial judge exhibited sensitive concern for the rights of the accused and extraordinary patience with a contumacious litigant." Id. at 13. Regarding the timing of Slappy's request, the Court concluded:

> . . . the trial court was abundantly justified in denying respondents' [sic] midtrial motion for a continuance so as to have [his prior counsel] represent him. On this record, it could reasonably have concluded that respondent's belated requests to be represented by [prior counsel] were not made in good faith but were a transparent ploy for delay.

Id. at 13. The Court thus rejected the Ninth Circuit Court of Appeals' intermediate holding that a continuance had been necessary to ensure that Slappy's representation by counsel was constitutionally adequate and "meaningful." Id. at 13-14.

Applying Slappy here, Scales' argument also fails. As in Slappy, Scale's request for continuance came mid-way through trial. And as in Slappy, the record fails to support the need for a continuance. In Slappy, the defendant had at least asserted a legal ground for continuance – the need for adequate preparation by counsel – although the Court suggested it was a "transparent ploy for delay." Id. at 13. But here, Scales' asserted reason for a continuance was that it would permit him to "be a little bit more relaxed." (Tr., p. 171, Ls. 15-16.)

Scales expressed that the decision whether to testify was stressful, indicating, "if this all goes wrong . . . [y]ou will all get to go home . . . [and] see your children. I don't." (Tr., p. 170, Ls. 11-17.) The trial judge sympathized that

"trials are stressful," (Tr., p. 171, L. 18), and he could take his time, drink some water, but "[t]he jury is here. The jury is present. This is the day set for trial, so we need to proceed" (Tr., p. 169, Ls. 8-14). As already discussed, nothing unforeseen happened during the state's case to justify the requested additional time for Scales to decide whether to testify.

Without more, the difficulty of deciding whether to testify and the resultant stress of having to make the decision simply do not warrant more time for the defendant to decide. If the difficulty and stress of deciding whether to testify required a continuance, as Scales proposes, then all requests for continuance on that basis would be justified; any denial of such continuance would be an abuse of discretion. Such a rule would eviscerate the trial court's discretion to decide the appropriateness of the motion. This is contrary to the well-established standard that whether to grant continuances are in the sound discretion of the trial court. Nunez, 133 Idaho at 21, 981 P.2d at 746; Hudson, 129 Idaho at 481, 927 P.2d at 454. Because Scales asserted no valid factual or legal justification for his requested continuance, he has failed to show the trial court abused its discretion.

Scales cites two decisions addressing the denial of a continuance in the context of a request for new counsel. State v. Pratt, 125 Idaho 546, 873 P.2d 800 (1993); State v. Carman, 114 Idaho 791, 760 P.2d 1207 (Ct. App. 1988). In Pratt, the Idaho Supreme Court noted, "because the constitutional right to counsel is at issue, we review the record independently to determine if this constitutional right has been abridged." 125 Idaho at 555, 873 P.2d at 809; see

also Carman, 114 Idaho at 793, 760 P.2d at1209. Pratt advised the court his family had retained private counsel who he wished to replace his court-appointed public defender, but that his chosen counsel needed an additional two weeks to prepare. Id. The Court identified seven factors to consider in determining whether a continuance should be granted in these circumstances. Id. The same factors were addressed in Carman, 114 Idaho at 793, 760 P.2d at 1209.

In Scales' case, the constitutional right to counsel of his choice was not at issue. Accordingly, the analysis employed in Pratt and Carman – triggered by the right-to-counsel issue – is inapplicable here. Scales attempts to apply the Pratt and Carman analysis, but without "those factors [that] are not relevant to the issue in this case." (Appellant's brief, p. 6 n. 1.) However, Scales cites no legal authority justifying this partial-application of Pratt and Carman absent a deprivation of the right to proceed with counsel of choice. Without a deprivation of an actual right, the factors used in Pratt and Carman simply do not apply.

Even considering the factors from Pratt and Carman, selected and discussed in appellant's brief, Scales' arguments still fail. Those factors include:

> the timing of the motion; the requested length of delay, including whether the delay is an attempt to manipulate the proceedings; the number, if any, of similar continuances sought by the defendant; inconvenience to witnesses; [and] any prejudice to the prosecution . . ..

Pratt, 125 Idaho at 555, 873 P.2d at 809. (Appellant's brief, pp. 5-6.)

Although Scales' requested delay was brief, the timing of the request – midtrial – supports its denial. See Slappy, 461 U.S. 1. The delay would have impacted the prosecution and state's witnesses because, if Scales chose to testify, some witnesses might have been needed for rebuttal. It is true that

Scales was not "manipulative" in that he did not disguise a mere delay tactic under valid substantive grounds. Instead, Scales candidly sought more time so that he could "be a little bit more relaxed." (Tr., p. 171, Ls. 15-16.) But even absent bad faith, a delay for delay's sake is not a valid legal ground for continuance.

Scales' efforts to couch his issue in terms of constitutional principles is unavailing. (Appellant's brief, pp. 9-13.) There is no constitutional right to be more relaxed. Scales has not shown that he lacked a meaningful opportunity to be heard, to consult with counsel, or to decide whether to testify, in the nearly five months leading up to his trial. The record simply does not support that Scales was denied a substantial right or that the lack of a continuance denied him a fair trial. He has failed to show otherwise, or to cite to any legal authority supporting his argument that a constitutional right was violated. Accordingly, Scales has failed to demonstrate the district court abused its discretion in denying his requested continuance.

CONCLUSION

The state respectfully requests that this Court affirm Scales' judgment of conviction.

DATED this 29th day of May, 2014.

DAPHNE J. HUANG
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of May, 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

DAPHNE J. HUANG
Deputy Attorney General

DJH/pm